BANK BUMIPUTRA MALAYSIA BHD.

v.

DATO' MOHD ANUAR B. EMBONG & ANOR.

HIGH COURT MALAYA, KUALA TERENGGANU
DATUK MOHD SAARI BIN YUSOFF J.
[ORIGINATING SUMMONS NO. 24-132-89]
27 AUGUST 1994

CONTRACT: Breach of contract - Assessment of damages - Loss of profits - Whether too remote - Whether plaintiffs had brought themselves under either of the limbs of the rule in Hadley v. Baxendale - Application of s. 74(1) Contracts Act 1950 - Measure of damages - Whether proved on a balance of probabilities - Whether any damage suffered by the plaintiffs offset by the increase in the value of the property in the intervening period.

The plaintiffs had charged 66 land titles to the defendant. The defendant agreed to discharge 11 lots. On the defendant's failure to discharge the titles as agreed, the plaintiff obtained judgment against the defendant and it was ordered that damages be assessed. The learned Senior Assistant Registrar ordered the defendant to pay damages amounting to RM4,422,366 plus interest. The defendant appealed.

On appeal, the question that arose was whether the plaintiffs/respondents had brought themselves within either of the two limbs of the rule in *Hadley v. Baxendale* to enable them to claim loss of profit for the housing project that they were involved in or whether the said loss of profit was too remote.

Held:

[1] According to the valuation report submitted by the defendant/appellant, which was not challenged by the plaintiffs/respondents, the 11 lots had increased in value by nearly RM100,000 as at the date of actual discharge of the charges. In the circumstances, the plaintiffs could not and did not suffer any damage arising naturally from the breach of contract committed by the defendant. On the facts, the loss of profit, as claimed, did not fall under the first limb of the rule in *Hadley v. Baxendale.*

[2] The only communication made by the plaintiffs to the representative of the defendant was when PW8 expressed the desire to sell the 11 lots with the view to finance the project to supplement the bridging finance given to the plaintiffs by the defendant. The fact that PW8 was desirous of financing the project partly with his own money through sale of the 11 lots did not constitute a part of the bargain which prompted the defendant in agreeing to discharge the 11 charges.

[3] The determining factor in the present case is whether at the time of the appellant agreeing to discharge the 11 charges it was within the contemplation of the parties that loss of profit would result on account of the 11 charges not being discharged. From a perusal of the record, it was clear that there was no evidence to substantiate the assertion that the matter was within the contemplation of the parties at the time the defendant agreed to discharge the 11 charges.

[4] There was nothing whatsoever mentioned in the correspondence between the plaintiffs and the defendant about the loss of profit on account of the 11 charges not being discharged and applying the second limb of the rule in *Hadley v. Baxendale*, the loss of profit on account of the 11 charges not being discharged was not within the contemplation of the parties.

[5] Taking the evidence as a whole, the plaintiffs have not satisfied the burden of proving that the measure of damages has been established on a balance of probabilities. In the circumstances, the plaintiffs would only be entitled to nominal damages in the sum of RM5,000.

[Order of SAR set aside. Judgment entered for the plaintiffs in the sum of RM5,000 with interest. Each party to bear own costs].

Cases referred to:
Hadley v. Baxendale [1854] 9 Exch. 341 ***(foll)***
Eikobina (M) Sdn. Bhd. v. Mensa Mercantile (Far East) Pte. Ltd. - SCCA 03-25 of 1992 ***(refd)***
Popular Industries Ltd. v. Eastern Garment Manufacturing Sdn. Bhd. [1989] 3 MLJ 360 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74(1)

Other sources referred to:
Law of Contract, Cheshire & Fifoot, 10th Edn., p. 539
McGregor on Damages, 15th Edn., p. 54 para 97

For the applicant - Tommy Thomas (Peter Pereira with him); M/s. Skrine & Co.
For the respondent - Thangaraj Balasundram (Ghazi Ishak with him); M/s. Thangaraj & Associates

JUDGMENT

Mohd Saari Bin Yusoff J:
In the proceedings in the High Court, the respondents/plaintiffs sought a declaration that the appellant/defendant had unlawfully withheld the discharge of 11 charges in respect of 11 lots belonging to the respondents. Judgment was entered against the appellant.

This Court *inter alia* ordered that damages be assessed. In the proceeding before the learned Senior Assistant Registrar, the appellant was ordered to pay a sum of RM4,422,366 plus interest. The appellant now appeals. There is also a cross appeal by the respondents.

It is common ground that an overdraft facility of RM1.5 million given to the respondents by the appellant was for a housing project on Lot 1233 EMR 892 Mukim Batu Buruk, Kuala Terengganu (hereinafter referred to as "the project"). Later, the overdraft facility was increased to RM2.5 million. As collateral, the respondents charged Lot 1233 EMR 892 Mukim Batu Buruk, Kuala Terengganu. Later the said land was sub-divided into 66 titles. It seemed that after the sub-division the appellant agreed to discharge the charges of the 11 lots leaving 55 lots as collateral. Phase 1 and 2 of the project was completed but Phase 3 was not completed due to financial problems.

The 11 lots on which the appellant agreed to discharge the charges were as follows:

1. H.S.(M) 635 Lot P.T. 871P
2. H.S.(M) 644 Lot P.T. 880P
3. H.S.(M) 645 Lot P.T. 881P
4. H.S.(M) 646 Lot P.T. 882P
5. H.S.(M) 656 Lot P.T. 892P
6. H.S.(M) 658 Lot P.T. 894P
7. H.S.(M) 660 Lot P.T. 896P

8. H.S.(M) 661 Lot P.T. 897P
9. H.S.(M) 662 Lot P.T. 898P
10. H.S.(M) 663 Lot P.T. 899P
11. H.S.(M) 701 Lot P.T. 937P

In the finding of this Court, a contract between the parties emerged when the appellant/defendant agreed to discharge the charges of 11 lots as evidenced by letter (P11) by the appellant to the respondents dated 20 June 1983. The appellant was held to be in breach when he failed to discharge the 11 charges.

Hadley v. Baxendale [1854] 9 Exch. 341 defined the kind of damage that is the appropriate subject of compensation, and excluded all other kinds as being too remote.

The rule that governs remoteness of damage was stated as follows in *Hadley v. Baxendale (supra)*:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

The above rule is embodied in s. 74(1) Contracts Act 1950. The question to be asked is, what is the natural and probable damage arising from the breach of contract committed by the appellant?

At the hearing before the learned SAR, the appellant tendered a valuation report (D1) which document was unchallenged by the respondents. According to the valuation report (D1), the 11 lots increased in value by nearly RM100,000 in the five year period from 30 June 1987 to March 1992 (date of actual discharge of the 11 charges). The open market value for the 11 lots as on 30 June 1987 was RM623,600 while the open market value for the same lots as on 5 March 1992 was RM722,700. Accordingly the respondents could not and did not suffer any damage arising naturally from the breach of contract committed by the appellant. Hence, on the facts, it appears that the loss of profit as claimed does not fall under first limb of the rule.

Next question is whether the claim could be allowed under second limb.

To quote Peh Swee Chin SCJ in *Eikobina (M) Sdn. Bhd. v. Mensa Mercantile (Far East) Pte. Ltd.* - SCCA 03-25 of 1992:

> The Courts have long recognised that a contract breaker could not be liable for all consequences which flow naturally from a breach of contract and that they must draw a line somewhere, otherwise the consequences would be, *inter alia*, ruinous to the contract breaker. Thus, certain of such ensuing consequences would be regarded as too remote to be claimable, "not perhaps on ground of pure logic but simply for practical reasons", to quote a dictum of Lord Wright in *Leesbosch Dredger v. Edison*, SS [1933] AC 449 at 460 made in similar vein.

In *Hadley v. Baxendale (supra)*, the facts of the case were as follows:

> The mill of the plaintiffs at Gloucester was brought to a standstill by a broken crank shaft and it became necessary to send the shaft to the makers at Greenwich as a pattern for a new one. The defendant, a common carrier, promised to deliver it at Greenwich on the following day. Owing to his neglect, it was unduly delayed in transit, with the result

that the mill remained idle for longer than it would have done had there been no breach of the contract of carriage. The plaintiffs, therefore, claimed to recover damages for the loss of profit caused by the delay.

The **Law of Contract** 10th Edn. by Cheshire and Fifoot page 539 last paragraph *inter alia* states:

Adderson B demonstrated that, in accordance with the principle that he had just expressed, there were only two possible grounds upon which the plaintiffs could sustain their claim. Firstly, that in the usual course of things the work of the mill would cease altogether for the want of the shaft. This, he said, would not be the normal occurrence, for, to take only one reasonable possibility, the plaintiffs might well have had a spare shaft in reserve. Secondly, that the special circumstances were so fully disclosed that the inevitable loss of profit was made apparent to the defendant. This, however, was not the case, since the only communication proved was that the article to be carried was the shaft of a mill and that the plaintiffs were the owners of the mill. The jury, therefore, should not have taken the loss of profit into consideration in their assessment of damages.

In instant case it appeared that the only communication made by the respondents to the representative of the bank (Hashim) was when PW8 expressed the desire to sell the 11 lots with the view to finance the project to supplement bridging finance of RM2.5 million given to the respondents by the appellant.

It may be noted that it was entirely PW8's idea on how he was going to raise additional bridging finance of about RM400,000 needed for the project. Whether PW8 did in fact carry out his plan to sell the 11 lots was of no concern of the appellant and there was nothing that the appellant could do about it if PW8 were to decide not to proceed with the proposed sale but instead elected to raise additional bridging finance through other means. In short the fact that PW8 was desirous of financing the project partly with his own money through sale of the 11 lots did not constitute a part of the bargain which prompted the appellant in agreeing to discharge the 11 charges.

It is true that PW8 did intimate to Hashim of his plan to raise additional bridging finance from the sale of the 11 lots.

In the business world, it is common knowledge that a proposition to sell property is one thing, whether PW8 is also able to sell all the 11 lots and realise the proceeds of sale fully in time to meet the necessary bridging finance is another matter. Even if the 11 charges were discharged on or about 13 June 1987 (date of appellant's letter instructing his solicitor to discharge the charges) there was no guarantee that PW8 would realise the entire sum of RM400,000 (additional amount required) in time to meet the bridging finance for Phase 3. It may be noted that the proposition by PW8 to realise RM400,000 was subject to imponderables such as:

(i) the proposed sale of 11 lots had to be advertised;
(ii) whether there was good demand for such lots;
(iii) purchasers would take time to settle the purchase price.

Further, in the event of the appellant failing to discharge the 11 charges, there was a reasonable possibility that the respondents would turn to other sources for bridging finance. One of the avenues open to the respondents was to apply for a further overdraft facility from the appellant. Then, the respondents' property charged to the appellant's bank as collateral was valued by Rahim & Co. at RM4 million, as in P9; while the overdraft facility then extended to the respondents by the appellant amounted to RM2.5 million.

a In evaluating the respondents' case, I also turn to the evidence regarding the purported sale of 8 lots of the 11 lots to 3 persons namely PW1, PW2, and Haji Awang Sdn. Bhd.

PW1 testified that a deal was struck whereby PW1 would pay the respondents a sum of RM350,000 for 6 lots as stated in a letter (P1) dated 29 May 1983. In the case of PW2, he testified that he agreed to buy one of the lots for a sum of RM75,000 as evidenced by a sale and purchase agreement (P2) executed on 16 June 1987. In the case of Haji Awang b Sdn. Bhd., PW4, a director of the company, testified that the company agreed to buy one of the lots as evidenced by a sale and purchase agreement (P4) executed on 20 June 1988.

The determining factor in the instant case is whether at the time of the appellant agreeing to discharge the 11 charges, it was within the contemplation of the parties that loss of profit would result on account of the 11 charges not being discharged.

c From my perusal of the record, I find no evidence to substantiate the assertion that the matter was within contemplation of the parties at the time of the appellant agreeing to discharge the 11 charges. However, when PW8 went to see Hashim (Bank representative) to negotiate for an increase in overdraft facility from RM1.5 million to RM2.5 million, I note that PW8 did convey to Hashim about PW8's plan to sell the 11 lots with d the view of using the proceeds as bridging finance for the project. Also, there is this covering letter (P8). As PW8 was then negotiating for an increase in overdraft facility from RM1.5 million to RM2.5 million, I take it to be that the covering letter (P8) accompanying a feasibility study was intended to impress the appellant on viability of the project and nothing else.

Looking at the correspondences (P10, P12) between the respondents and the appellant, e nothing whatsoever was mentioned about loss of profit on account of the 11 charges not being discharged. Covering letter (P8) is an application to the appellant for an increase in overdraft facility from RM1.5 million to RM2.5 million.

Applying the second limb of the rule in *Hadley v. Baxendale (supra)* to the facts and circumstances of the instant case, I am of the considered view that the loss of profit on account of the 11 charges not being discharged was not within the contemplation of the f parties.

In the result, I disallow the claim for loss of profit as being too remote.

Measure of Damage

Adverting to the covering letter (P8) in which a figure of RM3.4 million was cited, at best g it tantamounts to a bare statement of fact.

For the respondents, En. Ghazi argued that the project must have been viable and profitable otherwise the appellant would not have approved overdraft facility of RM2.5 million. It may well be that the project was profitable but the question is how much? There was nothing in P8 or in the oral evidence of PW8 to suggest how the amount of RM3.4 million was arrived at. With respect, PW8's evidence is too general and vague to h assist the Court in determining whether the projected profit stated in P8 is reasonable.

Based on PW8's evidence, En. Ghazi informed the Court that the figure of RM3.4 million, as in P8, represented the projected profit for all the three phases. But no evidence was led regarding the development cost and the gross income of the completed project namely Phase 1 and 2. The uncompleted part was Phase 3.

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Taking the evidence as a whole, I am not satisfied that the proof on measure of damages has been established on the balance of probabilities [see *Popular Industries Ltd. v. Eastern Garment Manufacturing Sdn. Bhd.* [1989] 3 MLJ 360].

Claim by two companies & Indahreka Akitek

In going through the evidence, I find that there is nothing to substantiate that the damages as claimed was within the contemplation of both parties at the time of the appellant agreeing to discharge the 11 charges. Hence, the claim must be disallowed.

Damages for Shame (Malu)

McGregor On Damages 15th Edn. page 54 paragraph 97 *inter alia* states:

> The reason for the general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction. If however the contract is not primarily a commercial one, in the sense that it affects not the plaintiff's business interests but his personal, social and family interests, the door should not be closed to awarding damages for mental suffering if the Court thinks that in the particular circumstances the parties to the contract had such damages in their contemplation.

In the instant case, the dispute between the respondents and appellant was one concerning a commercial matter and not personal. Further, there is nothing to suggest, damages was within contemplation of both parties. Hence, the claim under this head must be disallowed.

Claim by three purchasers

It is common ground that the 11 charges had been discharged in March 1992. On this score, the loss accrued to the respondents (if any) was offset by the increase in the open market value of the 11 lots as evidenced by the valuation report (D1).

Further, from the evidence adduced, there is nothing to substantiate that the proposed sale of 8 lots as stated in documents (P1, P2, P4) were communicated to the appellant at the time of the appellant agreeing to discharge the 11 charges. That being so, the damages is not within the contemplation of the parties. The claim under this head must therefore be disallowed.

Deposit

No order made under this head as the charges of the 11 lots had been discharged.

Damages

As decided by Ahmad Fairuz J. on 10 August 1991, the respondents succeeded on liability. On quantum, En. Thomas for the appellant suggests a sum of RM3,000 as nominal damages. However, I am of the view that the amount should be RM5,000.

For reasons stated above, I set aside the order of learned Senior Assistant Registrar and as a substitute, I enter judgment for the respondents in the sum of RM5,000 with interest from the date of this judgment to the date of realisation. Each party to pay his own costs in this Court and the Court below.